



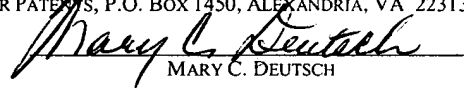
PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: HENRY ET AL	Examiner: LIEN T. TRAN
Serial No.: 10/001,497	Group Art Unit: 1761
Filed: NOVEMBER 14, 2001	Docket No. (P5746US)
For: FREEZER TO OVEN BISCUIT SWIRL	(PIL0123/US)

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Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

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MARY C. DEUTSCH

PRE-APPEAL BRIEF REQUEST FOR REVIEW

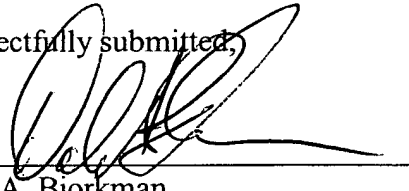
Dear Sir or Madam:

This communication is being filed with a Notice of Appeal.

It is believed that no other fee is required in filing this submission. However, if
any fee is required, please charge the appropriate fee to the Kagan Binder Deposit
Account No. 50-1775 and notify us of the same.

Dated: August 4, 2006

Respectfully submitted,

By: 
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PRE-APPEAL BRIEF REQUEST FOR REVIEW

Claims 1-17 are pending and have been rejected under 35 U.S.C. 103(a) as being unpatentable over Hansen et al in view of the Professional Baking cookbook and Hahn et al.

The present invention relates to bread-like products that can be easily prepared by the end user simply by baking a frozen, unproofed product. The product as presently described and claimed is a "biscuit swirl," which is a novel product having the organoleptic properties of a luxuriant roll, but with the ease in preparation of a freezer-to-oven product. The present product mimics the organoleptic properties of traditional products that historically are much more difficult to prepare, because the traditional product made from conventional bread dough (especially when the bread dough comprises a yeast leavening agent) does not perform properly in convenience freezer-to-oven preparation conditions. See the background discussion at page 2 of the present specification. Thus, surprising results flow from the use of biscuit dough in a product configuration that is to say the least unconventional for this class of dough from the perspective of the skilled artisan.

A clear error exists in the outstanding Final Office Action and subsequent Advisory Actions due to the assumption that biscuit dough and bread dough are equivalent without the need for a teaching of equivalency, and that the ultimate products as defined by shape and configuration are therefore completely interchangeable.

The distinctness of biscuit dough vis-à-vis bread dough has been established on the record as discussed in Point #1 of Applicant's reply filed May 30, 2006. Specifically, biscuit dough is underdeveloped as compared to bread dough, and this difference results in textural and performance properties that are manifested in the types of products and environments of use for biscuit dough vs. bread dough. Thus, one type of dough is expected to be suitable for use in one type of products, and the other type of dough is expected to be suitable for a different type of products. It is particularly noted that the Patent Office has already acknowledged the distinction between bread dough and biscuit dough in this application, in the Advisory Action dated July 1, 2004. No new analysis

has been presented in any Office Action since July 1, 2004 to support a reversal of this previous acknowledgement.

Once it is acknowledged that biscuit dough and bread dough are distinct, and further that they have different product applications, the outstanding rejection must fail for lack of motivation to carry out a substitution of one dough for another in any given product category. Specifically, the primary reference (Hansen) relates only to bread dough products and does not describe biscuit dough or its expected products at all. One would not have been motivated to turn to biscuit doughs to prepare products described in Hansen because these doughs are art recognized as being distinct from one another in properties and performance. Additionally, the outstanding rejection must fail for lack of consideration of the unexpected results obtained by the use of biscuit dough in the presently defined product of frozen, unproofed, unbaked biscuit swirl capable of being baked without an intermediate thawing or proofing step that, when baked, has a baked specific volume of greater than about 2.2.

Additionally, the outstanding Office Action and Advisory Actions contain a misunderstanding about the challenge in making larger sized products, which leads to a failure to properly consider the unexpected results obtained by the present products.

Advantages in Baked Specific Volume (BSV) performance of the present product configuration are discussed at length in the present prosecution, particularly on page 4 of the Response filed January 25, 2006. This advantage becomes more remarkable as the product increases in size. Larger sized products are claimed in claims 6-8, which were separately argued to be patentable on page 5 of this same response.

The most recent Advisory Action states that Hansen does not discuss the difficulty of forming larger sized products. This is in error. See Point # 4 of Applicant's reply filed May 30, 2006, and in particular column 3, lines 40-54 and line 63 to column 4, line 9 of Hansen. The most recent Advisory Action goes on to state that it is not uncommon to find the same baked product in different sizes, citing bagels that come in bite sized and larger sizes. This, however, ignores the claim limitation that is the basis for the difficulty of making products of larger sizes – the present claims are directed to freezer-to-oven products. As discussed in Point # 4 of Applicant's reply filed May 30,

2006, it is a very logical and self-evident conclusion that frozen items of larger size would present greater challenges in thoroughly and evenly expanding and cooking from a frozen state in a freezer-to-oven context than smaller items.

It is submitted that the present record shows that larger size bread-based products are challenging to make in a freezer-to-oven format and that the present claims provide an advantage in BSV performance in freezer-to-oven products in general, and in particular for larger sized products. Upon understanding this challenge, the outstanding rejection must fail for lack of consideration of the unexpected results obtained by the present products.

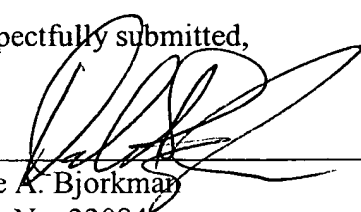
CONCLUSION

It is respectfully submitted that the outstanding rejection on the record is based on faulty assumptions of equivalency of biscuit dough and bread dough and a lack of understanding of the challenge of making freezer-to-oven products having desired BSV performance, particularly in larger product sizes. It is further submitted that these assumptions are clearly in error as shown by the present record. A favorable decision by the Conference Panel is therefore appropriate in this case and is hereby requested.

In the event that a phone conference between any member of the Conference Panel and the Applicants' undersigned attorney would help resolve any remaining issues in the application, the Examiner is invited to contact the attorney at (651) 275-9811.

Dated: August 4, 2006

Respectfully submitted,

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